



NORTH CAROLINA HOME BUILDERS ASSOCIATION

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February 14, 2022

Rules Review Commission
1711 New Hope Church Road
Raleigh, NC 27609

RE: Additional Written Comments - Proposed Permanent Rules - 15A NCAC 02L .0202

Members of the Rules Review Commission & Commission Staff:

On February 7th, we wrote to you regarding our concern with the Environmental Review Commission's (EMC's) desired revisions to 15A NCAC 02L .0202. As previously outlined, while groundwater rules are not normally of concern to NCHBA, we value a rulemaking process that strongly adheres to G.S. 150B, and out of that desire we bring our concern with the proposed 2L rules to your attention. We fear that if the Commission upholds this section of the proposed 2L rules this precedent could allow grounds for future rule revisions to other areas of the Administrative Code where the Agency would enable itself to alter regulations without adhering to the rulemaking process.

Please note that after submitting an initial public comment raising concern with the proposed revision to the 2L rules, and submitting a public records request to the Rules Staff to better understand the Agency's stance regarding this matter, our issue with the proposed revisions to 15A NCAC 02L .0202 remain. While a significant number of revisions were made to the proposed rules by Agency Staff after formal adoption by the Environmental Management Commission, we maintain that the proposed revisions to 15A NCAC 02L .0202 still allow the Agency to establish regulations that should be subject to rulemaking without traversing the temporary or permanent rulemaking process.

It is our understanding from the Agency and Rules Staff dialogue that:

1. The Agency considers practical quantitation limits (PQLs) as a scientific standard pursuant to G.S. 150B-2(8a)(h).
2. The Agency considers Interim Maximum Allowable Concentrations (IMACs) as modifications to the PQL scientific standard that are not subject to rulemaking as they attest that the revised rules pertaining to IMACs meet G.S. 150B-19(6) *"Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement."*

We do not dispute item 1 at this time but we do dispute item 2 based upon the following argument. If the revised rules included specific guidelines the Agency must follow regarding IMACs then we would not have a concern, but the revised rules (including the significant

number of revisions to the proposed rules made by Agency Staff after the EMC's adoption) do not include specific guidelines that the Agency must follow.

The revised rules concerning IMACs states that *"Any person may request the Director of the Division of Water Resources modify this requirement by establishing an Interim Maximum Allowable Concentration (IMAC). In addition, any person may request the Director of the Division of Water Resources to update or remove an existing IMAC. In response, the Director may establish, update, or remove an IMAC in accordance with Paragraphs (d), (e), and Rule .0130 (a) of this Subchapter..."* Please note that Paragraph (d) and (e) of the Subchapter pertains to groundwater quality standards not IMACs. While the Agency may desire to apply a similar framework to IMACs, we suggest that they clearly do so in the rules specific to IMACs to clearly satisfy G.S. 150B 19(6). In addition, the language that the Director *"**may** establish, update, or remove an IMAC in accordance with Paragraphs (d), (e), and Rule .0103 (a) of this Subchapter..."* grants the Director the ability to ignore Paragraph (d) and (e) if they so choose; therefore, this current language does not *"include specific guidelines that the agency must follow"*. This fact does not satisfy G.S. 150B-19(6).

In addition, as revised, the Director can establish an IMAC unilaterally with no expiration, as there is no mechanism to cause the IMAC to expire, outside of the Director's authority. In fact, the current revision of 2L under your consideration subordinates the EMC to the Director of the Agency. According to 15A NCAC 02L .0202 (g) the EMC only receives a report of the Director's actions involving an IMAC on a triennial basis while the Director retains all the power concerning how the IMAC will be handled during the review.

The EMC's ability remains constrained mainly to subsection (f) regarding this matter since the revised rules give the Commission no recourse involving IMACs beyond only the ability to bring the interim measure to a groundwater standard. In fact, the revised rule doubles down on the EMC's subordination to the Director within later parts of subsection (g) where it states: *"Any IMAC recommended under Subparagraph (g)(1) of this Rule that the Commission does not adopt shall remain an established IMAC and be reviewed during the next triennial review."*

This process involving an "interim" regulation established by an Agency Director that puts the authority of the overseeing Commission (in this case the EMC) subordinate to the Agency, and that lacks a mechanism to sunset an interim regulation outside of the power the revised rules grant to the Agency Director is very concerning. We hope that this rulemaking rational does not migrate to other areas of the Administrative Code to the demise of our members.

Based upon the facts of the matter before the Commission, we maintain that the revisions to 15A NCAC 02L .0202 do not satisfy G.S. 150B and should be rejected. In addition, the changes made by Agency Staff to the rules in an attempt to satisfy the concerns of the Rules Staff are substantial and should be brought through rulemaking to be approved by the EMC prior to adoption.

Know that we are truly grateful for your consideration of our comments regarding this matter and for your service to our state.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Millis". The signature is fluid and cursive, with a large initial "C" and a long horizontal stroke extending to the right.

Chris Millis
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